



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

Laurence A. Levy, Esq.
Greenberg Traurig, LLP
200 Park Avenue
New York, NY 10166

FEB 14 2018

RE: MUR 6989

Dear Mr. Levy:

On December 2, 2015, the Federal Election Commission ("Commission") notified your clients, the Honorable Benjamin Carson Sr., and Carson America, Inc., and Logan Delany, Jr., in his official capacity as treasurer, of a complaint alleging violations of the Federal Election Campaign Act of 1971, as amended (the "Act"). On February 8, 2018, the Commission decided to exercise its prosecutorial discretion to dismiss the allegations that your clients violated the Act. Accordingly, the Commission closed its file in this matter.

Documents related to the case will be placed on the public record within 30 days. *See* Disclosure of Certain Documents in Enforcement and Other Matters, 81 Fed. Reg. 50,702 (Aug. 2, 2016). The Factual and Legal Analysis, which explains the Commission's findings, is enclosed for your information.

If you have any questions, please contact Dominique Dillenseger, the attorney assigned to this matter, at (202) 694-1650.

Sincerely,

A handwritten signature in black ink, appearing to read "J. Lee" or "Jin Lee", written in a cursive style.

Jin Lee
Acting Assistant General Counsel

Enclosure
Factual and Legal Analysis

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**FEDERAL ELECTION COMMISSION
FACTUAL AND LEGAL ANALYSIS**

RESPONDENTS: Benjamin Carson MUR 6989
Carson America, Inc. and Logan D. Delany, Jr
in his official capacity as treasurer
Penguin Random House LLC

I. INTRODUCTION

This matter was generated by a Complaint filed with the Federal Election Commission by the American Democracy Legal Fund. The Complaint alleges that 2016 presidential candidate Benjamin Carson and his authorized campaign committee, Carson America, Inc. and Logan D. Delany, Jr. in his official capacity as treasurer (the "Committee"), (collectively the "Carson Respondents") accepted prohibited or excessive in-kind contributions from Penguin Random House LLC ("Penguin") when Penguin paid for campaign-related expenses during the promotional tour for Carson's new book, *A More Perfect Union: What We the People Can Do to Reclaim Our Constitutional Liberties* ("*A More Perfect Union*").¹ Relying on news accounts, the Complaint alleges that Carson (1) made campaign-related statements during the book tour; (2) improperly scheduled or "sandwiched" campaign events between book tour events; and (3) accepted a \$500 campaign contribution at a book tour stop, resulting in violations of the Federal Election Campaign Act of 1971, as amended (the "Act").²

Respondents deny the allegations. Penguin asserts that its promotional activities were bona fide commercial activity, and both Penguin and the Carson Respondents argue that

¹ Compl. at 6 (Nov. 30, 2015); see 52 U.S.C. §§ 30116(a), 30118(a).

² Compl. at 3, 5.

1 Penguin's payment for those activities also qualified for the media exemption.³ Further, the
2 Carson Respondents state that the book tour was conducted in compliance with the terms of a
3 formal written contract with Penguin which mandated separation between book and campaign
4 activities,⁴ and that Penguin's payments to Carson are not contributions, but compensation for
5 bona fide employment independent of his candidacy.⁵ While the Carson Respondents
6 acknowledge that Carson conducted campaign activity during the month in which he participated
7 in the book tour, they assert that campaign events were kept separate from book tour events and
8 the Committee paid for expenses for campaign-related meetings pursuant to the Commission's
9 allocation and mixed-use travel regulations.⁶

10 As set forth below, while the factual record indicates Carson discussed his candidacy at
11 some of the media appearances promoting his book, Penguin's payments for the book tour are
12 covered by the media exemption. And to the extent that any purely campaign-related activities
13 occurred during the time that Carson engaged in the book tour, those activities appear to have
14 taken place during Carson's unscheduled personal time, the Committee appears to have paid for
15 any related costs, and any costs of those activities not covered by the Committee appear to be *de*
16 *minimis*. Accordingly, the Commission exercises its prosecutorial discretion and dismisses the
17 allegations that Penguin made, and the Carson Respondents accepted, prohibited or excessive
18 contributions in violation of 52 U.S.C. §§ 30116(a) and (f) or 30118(a).⁷

³ Penguin Resp. at 2, 5 (Dec. 18, 2015); Carson Resp. at 20-23 (May 23, 2016); Supp. Carson Resp. at 2 (Dec. 23, 2016).

⁴ Carson Resp. at 13.

⁵ *Id.* at 7.

⁶ *Id.* at 12-13, 15-16.

⁷ See *Heckler v. Chaney*, 470 U.S. 821 (1985).

II. FACTUAL BACKGROUND

On May 15, 2015, Dr. Benjamin Carson filed a Statement of Candidacy with the Commission for the 2016 presidential election, designating Carson America, Inc. as his principal campaign committee. Carson continued his campaign until March 4, 2016, when he announced suspension of his presidential campaign.

Almost a year prior to declaring his candidacy, Carson, who is a retired pediatric neurosurgeon, lecturer, and bestselling author,⁸ entered into a book contract with Sentinel, a subdivision of Penguin Random House LLC.⁹ Penguin Random House LLC is one of the world's largest English-language general trade book publishers and includes a number of publishing groups and their imprints, including Sentinel.¹⁰ Sentinel is "a dedicated conservative imprint," which "publishes a wide variety of right-of-center books on subjects like politics, history, public policy, culture, religion, and international relations."¹¹

Penguin released Carson's book, *A More Perfect Union* on October 6, 2015,¹² while Carson was in the midst of his presidential campaign. The book ranked third on the New York Times Bestsellers List for the week ending October 24, 2015¹³ and remained on the List through

⁸ Carson Resp. at 1; Audrey Jones Decl. ¶¶ 4, 5, 6 ("Jones Decl."). Carson has authored a number of books, including several bestsellers: *GIFTED HANDS* (1992), *THINK BIG* (1996), *THE BIG PICTURE* (2000), *TAKE THE RISK* (2009), *AMERICA THE BEAUTIFUL* (2013), *ONE NATION* (2014); and *A MORE PERFECT UNION* (2015). Jones Decl. ¶¶ 4, 5; Sealy M. Yates Decl. ¶¶ 7, 8, 9 ("Yates Decl."). Carson is currently the United States Secretary of Housing and Urban Development.

⁹ Carson Resp. at 3-4. The contract was actually entered into between Sentinel and American Business Collaborative ("ABC"), a Florida-based LLC that serves as "pass-through entity for [Carson's] public speaking and book royalties." *Id.* at 1, 3-4.

¹⁰ Penguin Resp. at 2.

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

November 2015.¹⁴ According to Penguin, the book did not discuss the 2016 election but focused on Carson's views on the current status of the United States.¹⁵

A. Promotion of *A More Perfect Union*

Carson's book contract required him to participate in a promotional book tour for a three week period subsequent to the book's publication.¹⁶ The tour was held October 4, 2015 through November 6, 2015,¹⁷ and included stops in 38 cities and in 10 states — South Carolina, Georgia, Tennessee, Texas, Iowa, Florida, Kansas, Oklahoma, Nebraska, Missouri, and Washington, D.C.¹⁸ During the book tour, Carson attended book signings, spoke to the press, and appeared as a guest on various radio and television shows.¹⁹ Penguin organized and paid for the book tour and other promotional activities including a website promoting the book, the tour bus, and Carson's travel expenses.²⁰

According to Penguin, the book tour was organized to promote Carson's book and not his campaign.²¹ Penguin explains that the book tour was structured with a book tour week alternating with an off week to clearly separate book time from campaign time.²² During the

¹⁴ See *Best Sellers, Hardcover-Nonfiction*, NEW YORK TIMES (Nov. 29, 2015).

¹⁵ Penguin Resp. at 2.

¹⁶ Carson Resp. at 4; Yates Decl. ¶ 12.

¹⁷ *Id.*

¹⁸ Penguin Resp. at 2.

¹⁹ *Id.* at 3; Carson Resp. at 4; Yates Decl. ¶ 12.

²⁰ Penguin Resp. at 2.

²¹ *Id.* at 3.

²² *Id.* Penguin also states that it decided to schedule the book tour with alternating weeks for the campaign activities because of the Commission's lack of consensus on whether a candidate may host fundraising events in cities where the book publisher paid the candidate's travel costs to promote the book. *Id.* at 3 n.3 (citing Advisory Op. 2011-02 (Brown)).

1 book tour weeks, Penguin paid “all of [Carson’s] travel related expenses and controlled the
2 schedule, leaving only small blocks of time unscheduled.”²³ Carson campaign staff were barred
3 from traveling with Carson on the book tour bus or attending events, and contact with them was
4 limited to logistical scheduling.²⁴ Security was instructed to evict anyone attempting to
5 distribute campaign materials or obtain contact information from individuals at book signings.²⁵
6 In a National Public Radio (“NPR”) interview in which Carson was asked specifically about
7 scheduling the book tour during his campaign, he explained that the events would be scheduled,
8 staffed, and paid for separately, but observed that to a certain extent anything a candidate does
9 during a campaign likely will be viewed as campaigning.²⁶

10 Penguin also asserts that none of the promotional activities it paid for, including the
11 book’s promotional website, the tour bus, and events, referenced the candidacy.²⁷ Carson and his
12 literary agent, Sealy Yates, were specifically instructed that appearances and interviews were to
13 be limited to discussion of the book, not the campaign, and that Carson should redirect campaign
14 questions back to the book.²⁸

15 However, during Carson’s media appearances, he was frequently introduced as both
16 presidential candidate and author of his book. And in the course of the book tour, Carson made

²³ *Id.* at 3.

²⁴ *Id.*

²⁵ *Id.*

²⁶ See Compl. at 3-4 (citing Sam Sanders, *Ben Carson Book Tour Blurs the Line between Business and Politics*, NPR (Oct. 21, 2015), <http://www.npr.org/2015/10/21/450611700/ben-carson-book-tour-blurs-the-line-between-business-and-politics>). In the interview Carson noted: “Honestly, anything that you do when you’re running for president is campaigning, to a sense, because it’s going to be seen that way.” *Id.*

²⁷ Penguin Resp. at 3.

²⁸ *Id.*

1 statements such as: "I don't want to be the establishment candidate."²⁹ Carson also answered
2 questions about his general policy views including what actions he would take as President of the
3 United States. For example, on October 9, 2015, Carson appeared as a featured speaker to
4 promote the book at a National Press Club event entitled, "NPC Luncheon with Dr. Ben Carson,
5 Author and Republican Presidential Candidate."³⁰ At this event, Carson made statements about
6 the policies that he would implement as President, including "under a Carson administration, if
7 another country attacks us with a cyber attack, they're going to get hit so hard, it's going to take
8 them a long time to recover."³¹ He also answered questions about how he would act in specific
9 situations if elected President.³²

10 **B. Campaign Events Conducted During Month of Book Tour**

11 Respondents acknowledge that Carson did not suspend campaigning during the month of
12 the book tour but contend that the book tour events were kept separate from campaign events.
13 As already noted, Penguin asserts that the duration of the book tour was three weeks total, but it
14 was scheduled on alternate weeks to separate book time from campaign time.³³ Further, the
15 Carson Respondents state that the bulk of the book tour was spent on promotion of the book
16 except for several occasions when Carson used his limited scheduled personal time between

²⁹ See Compl. at 3 (citing Gideon Resnick and Betsy Woodruff, *Did Ben Carson Already Break Campaign Law?* THE DAILY BEAST (Oct. 19, 2015), <https://www.thedailybeast.com/did-ben-carson-already-break-campaign-law> (quoting Carson's October 6, 2015 appearance on Fox News' *Fox & Friends*).

³⁰ Compl. at 3; Carson Supp. Resp. at Ex. 2.

³¹ Carson Resp., Ex. 3 at 9; see also Compl. at 2 n.8 (citing National Press Club, "National Press Club Luncheon with Ben Carson – Transcript" at 9, Oct. 9, 2015, https://www.press.org/sites/default/files/20151009_carson.pdf).

³² Compl. at 3-4; Carson Resp., Ex. 3 at 10-16.

³³ Penguin Resp. at 3.

1 book tour events to meet with individuals to discuss campaign issues and activities.³⁴ Carson
2 asserts that all expenses related to such meetings were paid for by the Carson campaign pursuant
3 to protocols, applicable advisory opinions, and mixed use travel regulations at 11 C.F.R.
4 § 106.3,³⁵ but provides no details about the date and time of those meetings or how expenses
5 were apportioned and reported. The Committee reported spending over \$700,000 on travel-
6 related expenses during the book tour period, but it is unclear which, if any, of these
7 disbursements were made in connection with campaign expenses that were incurred on days of
8 the book tour.³⁶

9 Penguin stated that it structured the tour as “alternating weeks, one week for book tour
10 and one week off” to clearly designate the book tour from campaign activities.³⁷ During the first
11 week of the book tour (October 5-11, 2015), Carson participated in book tour events by
12 appearing on cable news television and radio shows, and attending the National Press Club
13 Luncheon on October 9 and book signing events on October 10 and 11. It does not appear that
14 book tour events were held on October 12-17. Book signing events resumed the following week
15 (October 18-25), followed by another break October 26-31, and finished with a week of book
16 signing events November 1-5.

17 The Complaint cites an article that states that Carson fit campaign events in between
18 book tour stops, specifically mentioning a book stop in the Woodlands, Texas, from which he
19 traveled to a campaign event in Plano, Texas, and then traveled to San Antonio for another book

³⁴ Jones Decl. ¶ 12.

³⁵ Carson Resp. at 12-14; Jones Decl. ¶¶ 12-15.

³⁶ See Carson America Amend. 2015 Year-End Report (March 28, 2016).

³⁷ See Penguin Resp. at 3.

1 stop on the same day.³⁸ Penguin stated that campaign staffers were not allowed to travel with
2 Carson during book tour stops and communication with the campaign was limited to logistical
3 scheduling.³⁹

4 III. LEGAL ANALYSIS

5 A. Penguin's Payments for the Promotion of the Book Are Covered by 6 the Media Exemption

7
8 The Act defines the terms "contribution" and "expenditure" to include any gift of money
9 or "anything of value" for the purpose of influencing a federal election.⁴⁰ The term "anything of
10 value" includes in-kind contributions, such as goods or services provided without charge or at a
11 charge that is less than the usual and normal charge for such goods or services.⁴¹ But the Act
12 exempts from the definition of expenditure "any news story, commentary, or editorial distributed
13 through the facilities of any broadcasting station, newspaper, magazine, or other periodical
14 publication, unless such facilities are owned or controlled by any political party, political
15 committee, or candidate."⁴² This exclusion is generally referred to as the "press exemption" or
16 "media exemption."⁴³

³⁸ See Compl. at 3 (citing Gideon Resnick and Betsy Woodruff, *Did Ben Carson Already Break Campaign Law?* THE DAILY BEAST (Oct. 19, 2015), <https://www.thedailybeast.com/did-ben-carson-already-break-campaign-law>).

³⁹ See Penguin Resp. at 3.

⁴⁰ 52 U.S.C. § 30101(8)(A), (9)(A).

⁴¹ 11 C.F.R. § 100.52(d)(1).

⁴² 52 U.S.C. § 30101(9)(B)(i).

⁴³ Advisory Op. 2010-08 (Citizens United) at 3 ("AO 2010-08").

1 To determine whether the media exemption applies, the Commission first assesses
2 whether the entity that engaged in the challenged activity is a press entity.⁴⁴ If so, the exemption
3 applies so long as the entity (1) is not owned or controlled by a political party, political
4 committee, or candidate and (2) is acting within its “legitimate press function” in conducting the
5 activity that is the subject of the complaint.⁴⁵ If the exemption applies, the entity’s activities are
6 exempt from the Act’s disclosure, disclaimer, and reporting requirements.⁴⁶ The Commission
7 has long recognized that an entity otherwise eligible for the exemption “would not lose its
8 eligibility merely because of a lack of objectivity in a news story, commentary, or editorial, even
9 if the news story, commentary, or editorial expressly advocates the election or defeat of a clearly
10 identified candidate for Federal office.”⁴⁷ The Commission also has determined that “where the
11 underlying product is covered by the press exemption, so are advertisements to promote that
12 underlying product.”⁴⁸

13 1. Press Entity Status

14 Neither the Act nor Commission regulations define the term “press entity.”⁴⁹ In AO
15 2010-08 (Citizens United), the Commission explained that “when determining whether the term
16 applies to a particular entity, the Commission has focused on whether the entity in question

⁴⁴ See, e.g., AO 2010-08; Advisory Op. 2005-16 (Fired Up!) (“AO 2005-16”); Advisory Op. 1996-16 (Bloomberg).

⁴⁵ *Reader’s Digest Ass’n v. FEC*, 509 F. Supp. 1210, 1215 (S.D.N.Y. 1981).

⁴⁶ AO 2010-08 at 7.

⁴⁷ AO 2005-16 at 6; Factual & Legal Analysis at 3, MUR 6579 (ABC News, Inc.) (July 5, 2012); *see also* AO 2010-08 (“While Citizens United’s films may be designed to further its principal purpose as a non-profit advocacy organization, an entity otherwise eligible for the press exemption does not lose its eligibility merely because of a lack of objectivity in a news story, commentary, or editorial.”).

⁴⁸ AO 2010-08 at 7.

⁴⁹ *Id.* at 5.

1 produces on a regular basis a program that disseminates news stories, commentary, and/or
2 editorials.”⁵⁰ Further, while recognizing that an earlier Commission advisory opinion had
3 narrowly construed the exemption as not covering media that was not enumerated in the Act or
4 Commission regulations, such as a book,⁵¹ the Commission advised that in more recent advisory
5 opinions, it has applied the exemption broadly and applied the exemption “to ‘news stories,
6 commentaries, and editorials, *no matter in what medium they are published.*”⁵²

7 Here, Penguin explains that it “is regularly engaged in the business of producing and
8 distributing books of all kinds and pays for the costs associated with promoting them.”⁵³ As
9 “the world’s largest English-language general trade book publisher,” including many publishing
10 groups and their imprints, which publish fiction and nonfiction, the company employs thousands
11 of people and publishes 70,000 digital and 15,000 print titles annually, with more than 100,000
12 eBooks available worldwide.⁵⁴ Based on this information, the Commission concludes that
13 Penguin qualifies as a press entity.

14 2. Ownership Criteria and Legitimate Press Function

15 It appears that Penguin also meets the final two criteria necessary to qualify for the press
16 exemption. Penguin states that it is not owned or controlled by any political party, political

⁵⁰ *Id.*

⁵¹ *Id.* at 4 (citing Advisory Op. 1987-08 (AIG/US News)).

⁵² Advisory Op. 2008-14 (Melothe, Inc.) (“AO 2008-14”) at 3 (quoting *Explanation and Justification for the Regulations on Internet Communications*, 71 Fed. Reg. 18589, 18608-18609 (Apr. 12, 2006)) (emphasis in original). See also AO. 2010-08 (Citizens United) at 4 (concluding non-profit corporation engaged in production and distribution of films is a press entity).

⁵³ Penguin Resp. at 5.

⁵⁴ *Id.* at 2.

1 committee or candidate,⁵⁵ and the Commission is aware of no evidence to the contrary. As to
2 whether a press entity is involved in its legitimate press function, the Commission has examined
3 (1) whether the entity's materials are available to the general public and (2) whether the
4 challenged materials are comparable in form to those ordinarily issued by the entity.⁵⁶ Both of
5 those conditions appear to be met here.

6 First, there is no dispute that the book, which was a *New York Times* bestseller, was
7 available to the general public. Further, the book appears to be comparable in form to other
8 books previously published by Penguin's imprint, Sentinel, which has published "a wide variety
9 of right-of-center books" on politics, history, and public policy.⁵⁷

10 Given that Penguin's publication of the book is covered by the media exemption, its
11 promotional efforts for the book would also be covered.⁵⁸ And Penguin's promotional activities
12 for Carson's book through a book tour, media interviews, and book signings, appear to be
13 comparable to business practices throughout the publishing industry when promoting a book.⁵⁹

⁵⁵ Resp. at 6.

⁵⁶ See, e.g., AO 2010-08 at 6 (citing *FEC v. Massachusetts Citizens for Life*, 479 U.S. 238, 250-51 (1986)); AO 2005-16.

⁵⁷ Penguin Resp. at 2. According to Sentinel's website, it has published other books by other prominent conservative figures, such as *Done Right Thing* by Mike Huckabee, *American Son* by Marco Rubio, and *A Patriot History of the United States* by Larry Schweikart and Mike Allen. See SENTINEL - PENGUIN BOOKS USA, <http://www.penguin.com/publishers/sentinel/>

⁵⁸ See AO 2010-08 at 7 ("[C]ourts have held that where the underlying product is covered by the press exemption, so are advertisements to promote that underlying product") (citing *FEC v. Phillips Publ'g*, 517 F. Supp. 1308, 1313 (D.D.C. 1981)).

⁵⁹ *Id.* at 5; see also Advisory Op. 2014-06 (Ryan) at 1-2 (Commission noted as a factual matter that Congressman Ryan would participate in the promotion of his book by appearing in a book tour that would include book signings and media appearances). Moreover, in the Advisory Opinion Request, the requestors noted that "it can be safely assumed that as part of this promotional book tour, news media will ask Congressman Ryan questions that are campaign- and election-related in nature." AOR 2014-06 at 14. Consequently, the facts developed in AO 2014-06 further suggest that Penguin's promotional activities conform to the standard practices for publishing books authored by candidates and public officials.

1 To the extent that Carson discussed his candidacy during media interviews, the Commission has
2 previously determined that on-air interviews of candidates are within the media exemption.⁶⁰
3 The Commission therefore concludes that Penguin's payment of the costs with respect to the
4 promotion of the book, as well as other costs referenced in the Complaint, fall within the media
5 exemption for corporate contributions and expenditures and are exempt from the Act's
6 disclosure, disclaimer, and reporting requirements.⁶¹

7 With respect to Carson's appearance at the National Press Club, the Carson Respondents
8 state that the National Press Club ("NPC"), a press entity, invited Carson to speak there at an
9 event moderated by the President of the NPC, who is a professional journalist, and paid for all
10 promotional costs related to this event, including hotel and food.⁶² Further, the Carson
11 Respondents provide additional evidence indicating that it was customary for the National Press
12 Club, a press entity, to invite a candidate to speak at the club, and to advertise any recently
13 published book authored by such candidate.⁶³ Thus, the costs for promoting the book at the
14 National Press Club also are covered by the media exemption.

⁶⁰ See Advisory Op. 2005-19 (Inside Track) at 4, n.4; Advisory Op. at 2004-07 (Music Television) at 6.

⁶¹ Penguin's payments for the book tour also appeared to be covered by the bona fide commercial activity exception to the definition of contribution. In determining whether activity is bona fide commercial activity, the Commission has identified a number of factors, including: "(1) whether the sales of the merchandise involve fundraising activity or solicitations for political contributions; (2) whether the activity is engaged in by the vendor for genuinely commercial purposes and not for the purpose of influencing an election; (3) whether the items are sold at the vendor's usual and normal charge; and (4) whether the purchases are made by individuals for their personal use." Advisory Op. 2014-06 (Ryan) at 9; First Gen. Counsel's Rpt. ("FGCR") at 14, MUR 5474/5539 (Dog Eat Dog Films, Inc.) (May 25, 2005); *see also* Advisory Op. 1994-30 (Conservative Concepts); Advisory Op. 1989-21 (Create-A-Craft). Here, the facts indicate that Penguin promoted the book for commercial purposes. The Commission has found no evidence that Penguin sold the book at below the market rate, and the book appears to have been widely sold to the public given that the book reached the New York Times Bestseller's List in October and November 2015. Further, there is no information that sales of the book involve fundraising activity or solicitations for political contributions. To the contrary, as described above, it appears that Penguin structured the book tour to keep it separate from campaign events.

⁶² Carson Resp. at 22; Supp. Carson Resp. at 1.

⁶³ Supp. Carson Resp. at 1.

B. Carson's Campaign-Related Activities During the Book Tour Appear to Be De Minimis

The media exemption does not cover all activities conducted by a media entity, and the Commission and courts have acknowledged that media entities may forfeit that exemption if they engage in certain core election-related activities unrelated to their ordinary press functions. In *FEC v. Massachusetts Citizens for Life* ("MCFL"), the Supreme Court held that a "Special Edition" of a newsletter did not qualify for the media exemption because it deviated from certain "considerations of form" relating to the production and distribution of the organization's regular newsletter.⁶⁴ The Court noted that MCFL did not publish the "Special Edition" through the facilities of the regular newsletter but with staff who prepared no previous or subsequent newsletters, and distributed it to a much larger audience than the newsletter's regular audience.⁶⁵ Similarly, in *Reader's Digest Ass'n v. FEC*, the court indicated that the press exemption "would seem to exempt only those kinds of distribution that fall broadly within the press entity's legitimate press function."⁶⁶ Thus, for example, the exemption would not apply where, "on Election Day a partisan newspaper hired an army of incognito propaganda distributors to stand on street corners denouncing allegedly illegal acts of a candidate and sent sound trucks through the streets blaring the denunciation, all in a matter unrelated to the sale of its newspapers."⁶⁷

The Commission also has advised that the legitimate media function is "distinguishable from active participation in core campaign or electioneering functions."⁶⁸ For example,

⁶⁴ 479 U.S. at 250-51.

⁶⁵ *Id.* at 251.

⁶⁶ 509 F. Supp. at 1214.

⁶⁷ *Id.*

⁶⁸ Advisory Op. 2011-11 (Viacom, Inc.) at 8 ("AO 2011-11") (citing AO 2008-14 at 5).

1 producing independent expenditure advertisements for a political committee,⁶⁹ paying the
2 administrative costs of a political committee,⁷⁰ engaging in get-out-the-vote activities,⁷¹ and
3 preparing briefings for campaign volunteers⁷² would not constitute legitimate press functions.
4 Thus, even if an entity is deemed to be a press entity, if it were to act in a manner atypical of a
5 press entity in the way in which it engages in core electioneering activities, the media exemption
6 will not shield that particular conduct.

7 Here, the Carson Respondents acknowledge that Carson attended some campaign-related
8 meetings during the limited personal time scheduled on some book tour days, though they
9 provide no specifics about such events. They have, however, provided sworn statements that all
10 expenses related to those meetings were paid for by the Committee. While the Commission does
11 not have specific information as to how the Committee determined which costs were campaign-
12 related, or how they allocated shared costs during the weeks of the book tour, it appears that such
13 campaign activity was not extensive.⁷³

14 On October 18, 2015, Carson appears to have attended several book tour events in
15 Houston, The Woodlands, and San Antonio, Texas and travelled to a campaign event in Plano,
16 Texas. Where an authorized committee pays for the promotional costs of a candidate's book
17 published by a commercial publisher that pays royalties to the candidate, the Commission has
18 determined that those payments will constitute a prohibited personal use under 52 U.S.C.

⁶⁹ AO 2011-11 at 9.

⁷⁰ *Id.*

⁷¹ AO 2008-14 at 5.

⁷² *Id.* at 6 ("Because the provision of personnel to benefit a political campaign is not a legitimate press function, if Melothe, Inc. staffers were to prepare and deliver daily briefings to campaign volunteers, a prohibited in-kind contribution or expenditure would result from the corporation.").

⁷³ See *supra* p. 5 (stating that during book tour weeks, Carson had only small blocks of unscheduled time).

1 § 301.14(b).⁷⁴ The Carson Respondents generally assert in sworn statements by Jones and Yates
2 that the Committee paid for all campaign related expenses. The Commission notes, however,
3 that they did not provide specific information showing that the Committee paid for expenses
4 related to the trip to Plano, and it is not possible to determine from the face of the Committee's
5 disclosure reports whether the Committee made any such payments. Nevertheless, based on the
6 sworn statements, and the fact that the cost of the single intrastate flight and any other costs
7 related to the Plano trip were likely *de minimis*, the Commission has determined not to pursue
8 any possible violation stemming from the campaign trip to Plano.⁷⁵ With respect to the book
9 tour days on which Carson also participated in radio and television interviews that discussed his
10 candidacy but not the book, the information in the record does not indicate that Carson made
11 separate trips that would have involved significant costs.

12 Finally, the Complaint cites to a news article to allege that Carson accepted a \$500
13 campaign contribution at a book tour event in Waco, Texas.⁷⁶ Penguin states that there were no
14 solicitations for contributions at the book signing events and the news story relied upon by the
15 Complaint is ambiguous as to whether Carson knew that the envelope contained a contribution.⁷⁷
16 The Carson Respondents do not address this allegation.

⁷⁴ See Advisory Op. 2011-02 (Brown); Advisory Op. 2006-07 (Hayworth). See also Factual and Legal Analysis at 4, MUR 6127 (Obama for America) (where campaign pays for travel that involves both personal and campaign activities, incremental expenses resulting from personal activities are personal use unless reimbursed by the candidate under 11 C.F.R. § 113.1(g)(1)(ii)(C)).

⁷⁵ See Factual and Legal Analysis at 5, MUR 6127 (Obama for America) (dismissing allegation that campaign improperly paid for personal travel based, in part, on small amount in violation).

⁷⁶ Compl. at 3, citing Jane Trim, "On Carson's Book Tour, Politics and Business are Blurred," MSNBC (Oct. 20, 2015), <http://www.msnbc.com/msnbc/carsons-book-tour-politics-and-business-are-blurred>.

⁷⁷ Penguin Resp. at 6.

1 As Penguin contends, the news report cited by the Complaint does not indicate that
2 Carson solicited any contributions at the book tour event in question. In fact, the article states,
3 “[a]s Carson signed books in the fast moving line, one young man handed the candidate an
4 envelope, which the candidate put in his breast pocket; he later told MSNBC that it was a \$500
5 donation and a resume, as he hopes to work for the candidate.”⁷⁸ Based on the article’s
6 description of the incident, it appears that Carson did not have much time to engage with book
7 event attendees, let alone solicit campaign funds, and did not discuss the contents of the envelope
8 with the contributor. Moreover, the incident involved a single \$500 contribution and is thus a *de*
9 *minimis* amount in violation.

10 **C. Conclusion**

11 Under the circumstances presented in this matter, the Complaint’s allegations regarding
12 Carson’s book tour do not merit further use of Commission resources to conduct an
13 investigation. As described above, Penguin’s payments for the promotional activities of
14 Carson’s book are covered by the media exemption and do not constitute contributions. Further,
15 the evidence indicates that Penguin took steps to separate book tour events from campaign events
16 by scheduling the book tour events on alternate weeks. To the extent that Penguin may have
17 inadvertently paid for activities which extended beyond the scope of media exemption, such
18 payments appear to be *de minimis*. Accordingly, the Commission dismisses the allegations that
19 Penguin Random House LLC violated 52 U.S.C. §§ 30116(a) or 30118(a) by making excessive
20 or prohibited contributions and that Benjamin Carson and Carson America, Inc. and Logan D.

⁷⁸ Trim, *supra* note 76.

- 1 Delany, Jr., in his official capacity as treasurer violated 52 U.S.C. §§ 30116(f) or 30118(a) by
- 2 knowingly accepting excessive or prohibited contributions.⁷⁹